



WESTERN RESOURCE
ADVOCATES

May 16, 2011

Laura Lockhart
Department of Environmental Quality
195 North 1950 West
Salt Lake City, Utah 84116-3085
Via email: llockhart@utah.gov

Re: Comments on Proposed Changes to Department of Environmental Quality Administrative Rules

Dear Ms. Lockhart,

Thank you for this opportunity to comment on proposed changes to the Department of Environmental Quality (DEQ) administrative rules (R305-6). I raise the issues below on behalf of FRIENDS of Great Salt Lake and Western Resource Advocates.

Intervention

As you are aware, our gravest concern is with DEQ's continued insistence that, with a request for agency action, "a person other than the recipient of an order" must file a petition to intervene. Proposed R305-6-202(7). This provision violates the Clean Water Act, Clean Air Act and Resource Conservation and Recovery Act and jeopardizes Utah's authority to administer these statutes. This is because, in order to maintain delegated authority under these laws, a state must provide for citizen participation in administrative and judicial review of its permit actions. See 42 U.S.C. § 6976(b) (RCRA); 42 U.S.C. § 7661a(b)(6) (Clean Air Act); 33 U.S.C. § 1369(b)(1) (Clean Water Act); *see also* 40 C.F.R. § 124.19 (RCRA); 40 C.F.R. § 70.4(b)(3)(x) (Clean Air Act); 40 C.F.R. § 123.30 (Clean Water Act). The proposed rules unduly restrict judicial review of permits and therefore violate these provisions and undermine Utah's authorization to issue permits under these federal laws.

For example, in order to retain its delegated power to implement its permitting program under the Clean Water Act, the Division of Water Quality must provide an opportunity for "judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process." 40 C.F.R. § 123.30.¹ Importantly, Utah will be judged as complying with this provision only if state law and regulation "allow[] an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit." *Id.* Proposed rule

¹ See also, *Clean Air Act Final Disapproval of Operating Permit Programs; Commonwealth of Virginia*, 59 Fed. Reg. 62324, 62325 (Dec. 5, 1994); *Virginia v. Browner*, 80 F.3d 869, 879 (4th Cir. 1996).

R305-6-202(7) and related provisions violate 40 C.F.R. § 123.30 by restricting the public's access to judicial review of state-issued permits beyond what is required to secure federal court review of a federal permit.

Proposed rule R305-6-202(7) improperly curtails judicial review of permits by requiring a member of the public to "intervene" in what is purported to be an ongoing proceeding in order to challenge a permit.² To successfully intervene in this proceeding, the member of the public must meet the requirements of, *inter alia*, Utah Code Ann. § 63G-4-207. Section 63G-4-207(2) states that

(2) The presiding officer shall grant a petition for intervention if the presiding officer determines that:

- (a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and
- (b) **the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.**

Utah Code Ann. § 63G-4-207(2) (emphasis added). Similarly, section 63G-4-207(3) provides

(3) (a) Any order granting or denying a petition to intervene shall be in writing and mailed to the petitioner and each party.

(b) **An order permitting intervention may impose conditions on the intervenor's participation in the adjudicative proceeding that are necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.**

(c) **The presiding officer may impose the conditions at any time after the intervention.**

Utah Code Ann. § 63G-4-207(3) (emphasis added).

Thus, by requiring compliance with section 63G-4-207, R305-6 gives a presiding officer discretion to deny or restrict intervention and therefore the ability to contest a permit, based on very broad and vague factors that are not required of a plaintiff seeking judicial review of permits in federal court.

Under the proposed rules, a presiding officer may prohibit members of the public from seeking administrative review of a permit based on a finding that the orderly and prompt conduct of the permit proceedings will materially impaired. Moreover, at any time, the presiding officer

² Arguably, members of the public must secure administrative review of a permit before adjudicating that permit in court. Utah Code Ann. § 63G-4-401(2) ("A party may seek judicial review only after exhausting all administrative remedies available"); *see also* Proposed R305-6-106(3).

may limit a citizen's participation in a permit proceeding, even a proceeding commenced by that citizen. Plainly, this expansive authority to deny or restrict the ability of the public to secure complete and meaningful administrative – and therefore judicial – review of permits is **not** consistent with citizen participation in administrative and judicial review of Utah's permitting actions. Rather, the proposed rules allow a presiding officer wide latitude to restrict access to administrative and judicial review of Utah-issued permits in a manner **not** permissible in federal court. Therefore, the relevant provisions of the proposed rules violate the law.³

Discovery

The proposed rules improperly restrict discovery and give the presiding officer too much discretion to limit discovery. Under the Utah Administrative Procedures Act and the statutes granting jurisdiction to Utah's courts, it is plain that a formal adjudication represents the plaintiffs' sole opportunity for a full trial of their claims, including points of fact – a formal adjudication is appealed to Utah's courts of appeal and plaintiffs are not entitled to a court trial. Therefore, to ensure due process and a fair hearing, plaintiffs must be granted discovery on par with the discovery allowed under the Utah Rules of Civil Procedure.

Effectiveness and Finality

The proposed rules indicate that an initial order becomes effective immediately, but is not final for 30 days. Proposed R305-6-106(1) & (2). Thus, the rules improperly allow an order that is not final to be effective. Agency actions that are not final may not be implemented. To allow otherwise undermines accountability, violates due process and equal protection and wrongly allows persons to act on agency decisions that are not final. Moreover, to permit orders to become effective immediately prejudices a party seeking a stay of that order, as the party will have no time period – even a period as short as 30 days – during which to secure a stay without the threat of significant harm.

Notice

The proposed rules fail to require a DEQ agency to notify the public of the issuance of an initial order or notice of violation. As the date of issuance triggers the opportunity for the public to contest an agency action, *see* Proposed R305-6-106(3), adequate public notice is critical. In addition, reliance on a website to notify the public of the opportunity to comment on proposed agency action is unfair to persons without computer access. *See* Proposed R305-6-105(3).

³ For the same reasons, the proposed rules violate the Utah Constitution's due process and open courts provisions.

Gender Neutrality

The proposed rules should be written in a way that is gender neutral. To do otherwise suggests that Utah's government is sexist.

Thank you for all you do to protect and enhance the environmental quality of Utah.

A handwritten signature in black ink, appearing to read 'J. Walker', with a large loop at the start and a trailing flourish.

JORO WALKER
Director, Utah Office



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May 16, 2011

VIA E-MAIL (llockhart@utah.gov) & U.S. MAIL

Laura Lockhart
Administration
Utah Department of Environmental Quality
195 N. 1950 W.
Salt Lake City, UT 84116-4870

Re: Comments on Department of Environmental Quality Proposed Administrative
Procedures Rule 305-6

Dear Ms. Lockhart:

The Utah Industry Environmental Coalition (UIENC) submits the attached comments in support of the new Final Administrative Procedures Rules, 305-6 proposed on March 15, 2011, (the "Rules"). UIENC had the opportunity to participate in the comment period during the drafting phase of the Rules, and believes that the Division of Environmental Quality ("DEQ") has incorporated well the comments made during that phase of the process. These new rules will clarify and simplify administrative hearings in Utah and UIENC supports this improvement. UIENC appreciates the efforts you and DEQ have made on these Rules.

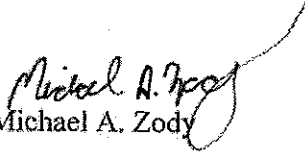
UIENC's comments are reflected in the attached redlined version of the Rules (attachment A), with explanatory notes in the margins where appropriate. UIENC also submits (attachment B) a short legal analysis entitled "Compliance with Clean Water Act's Public Participation Mandate."

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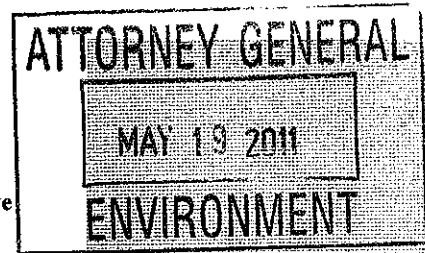
UIENC appreciates the opportunity to offer these comments and support DEQ in streamlining the administrative procedural rules by proposing R305-6.

Sincerely,

Parsons Behle & Latimer


Michael A. Zody

Attachments
cc: UIENC



**Attachment A to UIENC's Comments on the Revisions to R305-6 Administrative
Procedures for the Department of Environmental Quality**

**R305-6. ADMINISTRATIVE PROCEDURES FOR THE
DEPARTMENT OF ENVIRONMENTAL QUALITY**

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Part 11.

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R305-6. ADMINISTRATIVE PROCEDURES

Part 1. General Provisions and Preliminary Matters

R305-6-101. Purpose of Parts

Part 1 of this Rule (R305-6-101 through 118) addresses general and preliminary matters.

Part 2 of this Rule (R305-6-201 through 219) addresses procedures for adjudication.

Part 3 of this Rule (R305-6-301 through 303) addresses declaratory orders and emergency adjudication.

Part 4 of this Rule (R305-6-401 through 423) addresses matters relevant to specific statutes.

R305-6-102. Scope of Rule.

This rule governing administrative procedures applies to proceedings under:

- (1) the Environmental Quality Code, Utah Code Ann. Title 19, Chapter 1;
- (2) the Air Conservation Act, Utah Code Ann. Title 19, Chapter 2;
- (3) the Radiation Control Act, Utah Code Ann. Title 19, Chapter 3;
- (4) the Safe Drinking Water Act, Utah Code Ann. Title 19, Chapter 4;
- (5) the Water Quality Act, Utah Code Ann. Title 19, Chapter 5;
- (6) the Solid and Hazardous Waste Act, Utah Code Ann. Title 19, Chapter 6, Part 1;
- (7) the Hazardous Substances Mitigation Act, Utah Code Ann. Title 19, Chapter 6, Part 3;
- (8) the Underground Storage Tank Act, Utah Code Ann. Title 19, Chapter 6, Part 4;
- (9) the Used Oil Management Act, Utah Code Ann. Title 19, Chapter 6, Part 7;
- (10) the Waste Tire Recycling Act, Utah Code Ann. Title 19, Chapter 6, Part 8;
- (11) the Illegal Drug Operations Site Reporting and Decontamination Act, Utah Code Ann. Title 19, Chapter 6, Part 9;
- (12) the Mercury Switch Removal Act, Utah Code Ann. Title 19, Chapter 6, Part 10;
- (13) the Industrial Byproduct Reuse provisions, Title 19, Chapter 6, Part 10;
- (14) the Voluntary Cleanup Program provisions, Title 19, Chapter 8; and
- (15) the Environmental Covenants Act, Title 57, Chapter 25.

R305-6-103. Definitions.

The following definitions apply to this Rule. The definitions in Part 4 of this Rule, e.g., definitions of "Board" and "Executive Secretary," also apply for matters governed by the statutory provisions specified in that Part. If the definition in Part 4 differs from the definition in Part 1, the definition in Part 4 controls.

- (1) "Administrative Law Judge" or ALJ means the person appointed under Section 19-1-103 to conduct an adjudicatory proceeding.
- (2) "Administrative Proceedings Records Officer" means the person responsible for maintaining the administrative record, as identified in R305-6-109(8).
- (3) "Executive Director" means the Executive Director of the Department of Environmental Quality.
- (4) "Initial Order" means an Order, as defined in R305-6-103(6), that is issued by the Executive Secretary and that is the final step in the portion of a proceeding that is exempt from the requirements of UAPA as provided in Section 63G-4-102(2)(k). "Initial Orders" are further described in Part 4 of this Rule.
- (5) "Notice of Violation" means a notice of alleged violation issued by the Executive Secretary

that is exempt from the requirements of UAPA under Section 63G-4-102(2)(k).

(6) "Order" means any determination by a person or entity within the Department of Environmental Quality that affects the legal rights of a person or group of persons, but not including a rule made under the Utah Administrative Rulemaking Act, Title 63G, Chapter 3 and not including a Notice of Violation. Orders include but are not limited to:

- (a) compliance orders and administrative settlement orders;
- (b) cease and desist orders (but not including emergency orders issued under Section 63G-4-502);
- (c) approvals, denials, terminations, modifications, revocations, reissuances or renewals of a permit, plan approval or license;
- (d) approvals, denials, or modifications of financial assurance;
- (e) approvals, denials, or modifications of requests for a variance or exemption from regulatory requirements;
- (f) approvals, denials, or modifications of requests for application of alternative standards or requirements, or of an experimental program;
- (g) certifications or denials of certifications;
- (h) assessments of fees or penalties;
- (i) declaratory orders under Section 63G-4-503 and R305-6-302;
- (j) preliminary approvals preceding issuance of a permit, plan approval or license if the approval is identified and issued as an order; and
- (k) all other orders described as Initial Orders in Part 4 of this Rule.

(7) "Part" means the sections of this Rule that are grouped together by subject matter, e.g., Sections R305-6-401 through 423 are Part 4 of this Rule.

(8) "Party" is defined in R-305-6-204.

(9) "Person" means an individual, trust, firm, estate, company, corporation, partnership, association, state, state or federal agency or entity, municipality, commission, or political subdivision of a state. "Person" also includes, as appropriate to the matter, other entities as provided in definitions in the statutes specified in R305-6-102 and in rules promulgated thereunder.

(10) "Presiding Officer" shall mean, as appropriate:

- (a) The ALJ for proceedings conducted under Section 19-1-301;
- (b) The members of a Board, for proceedings associated with determinations to be made by the Board, including determinations under Section 19-1-301(6)(b);
- (c) The Board Chair as specified in R305-6-110(3), R305-6-215(3), and R305-6-216; or
- (d) Any other Presiding Officer specified in Part 4.

(11) "RFAA" means a Request for Agency Action. See R305-6-202.

(12) "Rule," unless otherwise specified, means this Rule R305-6, Administrative Procedures for the Department of Environmental Quality.

(13) "UAPA" means the Utah Administrative Procedures Act, Utah Code Ann. Title 63G, Chapter 4.

R305-6-104. Applicability of UAPA.

- (1) Proceedings that result in Initial Orders and Notices of Violation issued by the Executive Secretary are exempt from the requirements of UAPA, as provided in Section 63G-4-102(2)(k).
- (2) A proceeding to challenge an Initial Order or a Notice of Violation is subject to the requirements of UAPA as provided in this Rule.
- (3) Proceedings other than those described in R305-6-104(1) are subject to the requirements of

UAPA as provided in this Rule.

(4) Neither UAPA nor this Rule applies to requests for government records or requests for confidentiality of government records. Those matters are governed by the Utah Government Records Access and Management Act, Sections 63G-2-101 through 901, and by Section 19-1-306.

R305-6-105. Notice and Comment, and Exhaustion of Remedies.

(1) Public notice and an opportunity for comment is provided before some orders are issued. An agency may choose to provide opportunity for comment even if one is not required.

(2) If an opportunity to comment is provided, a prospective challenger must provide comments in order to preserve the challenger's right to contest an Initial Order. Comments are sufficient to preserve the right to contest an order, for each issue raised, if the comments provide sufficient information to give notice to the agency to allow the agency to fully consider the issue before making a determination. Providing comments does not, in and of itself, establish the commenter's standing.

(3) For purposes of this Section R305-6-105, notice of an opportunity to comment is sufficient if it meets statutory requirements. If there are no statutory requirements, notice of an opportunity to comment is sufficient if it is posted on DEQ's website, and if at least 30 days' notice is provided.

R305-6-106. Effectiveness and Finality of Initial Orders and Notices of Violation.

(1) Unless otherwise stated in the order or notice, an Initial Order or a Notice of Violation is effective upon issuance and, even if it is contested, remains effective unless a stay is issued or the Initial Order or a Notice of Violation is rescinded, vacated or otherwise terminated. A Notice of Violation has no legal effect or status other than notice of an alleged violation and the facts alleged to constitute a violation in a Notice of Violation do not become a violation unless the agency issues a final decision on the notice or the notice becomes final. ~~At~~ Initial Order or a Notice of Violation shall become final 30 calendar days after the date issued unless it is contested as provided in R305-6-202.

(2) The date of issuance of an Initial Order or a Notice of Violation is the date the Initial Order or a Notice of Violation is signed and dated.

(3) Failure to contest an Initial Order or a Notice of Violation before it becomes final under this R305-6-106 waives any right of administrative contest, reconsideration, review or judicial appeal.

R305-6-107. Designation of Proceedings as Formal or Informal.

(1) All proceedings to contest an Initial Order or a Notice of Violation and all other proceedings identified in Part 4 of this Rule shall be conducted as formal proceedings except as specifically provided in Part 4.

(2) The Presiding Officer in accordance with Section 63G-4-202(3) may convert proceedings that are designated to be formal to informal and proceedings which are designated as informal to formal if conversion is in the public interest and rights of all parties are not unfairly prejudiced. In the event the Presiding Officer is an ALJ, a decision to use informal procedures must be approved by the Board.

R305-6-108. Form of Submissions.

(1) Hard copy versions of documents submitted under this Rule shall ordinarily be printed on white paper that is 8-1/2 by 11 inches, with 1 inch margins and 12 point font. Double-sided printing is encouraged but not required. Electronic documents shall also be prepared for 8-1/2 by 11 inch

Comment (max 1): NOV is not effective upon issuance and remains only allegations until an NOV becomes final.

paper, using 1 inch margins and 12 point font.

(2) Requests for agency action, notices of agency action, and responses shall include numbered paragraphs.

R305-6-109. Service and Filing of Notices, Orders and Other Papers.

(1)(a) Unless otherwise directed by the ALJ or other Presiding Officer, and except as otherwise provided in this Section R305-6-109, filing and service of all papers shall be done solely by email. Filing and service under these proceedings will be governed by R305-6-109(3).

(b) In the event the ALJ or other Presiding Officer determines that it is inappropriate in a specific case to file and serve all papers by email, the requirements of R305-6-109(4) will govern. Those requirements may be modified by the ALJ or other Presiding Officer.

(c) The provisions of R305-6-109(2) will also apply regardless of whether filing and service are done by email (R305-6-109(3)) or by traditional (R305-6-109(4)) service methods.

(d) A party or prospective intervenor seeking to have filing and service requirements governed by R305-6-109(2), such as a person who does not have access to email, shall file and serve the request as provided in R305-6-109(4). Once a request to proceed under R305-6-109(4) is filed, the provisions of that section shall apply to all future filing and service unless otherwise ordered by the ALJ or other Presiding Officer.

(2) General Provisions Governing Filing and Service.

(a) Unless otherwise directed by the ALJ or other Presiding Officer, every filing shall be filed with the ALJ or other Presiding Officer. If no ALJ or other Presiding Officer has been appointed or otherwise identified in this Rule, every filing shall be filed with the Administrative Proceedings Records Officer.

(b) All papers that are required to be served shall also be served on the Administrative Proceedings Records Officer.

(c) Every filing shall be served upon, as applicable:

(i) the Executive Secretary;

(ii) the attorney representing the Executive Secretary;

(iii) the person who was the recipient of the notice of violation or order being challenged;

(iv) each person who has been granted intervention or who has filed a Petition to Intervene that has not been denied; and

(v) the Administrative Proceedings Records Officer, as provided in R305-6-109(8)(a).

(d) A person, other than the Executive Secretary, who is represented by an attorney or other representative, as provided in R305-6-111, shall be served through the attorney or other representative.

(e) Every filing shall include a certificate of service that shows the date and manner of service on the persons identified in R305-5-109(2).

(f) Regardless of whether a proceeding is governed by R305-6-109(3) or R305-6-109(4), documents that are filed expressly for the consideration of the Board, such as a party's comments on a draft decision, shall be provided to the Executive Secretary in hard copy for distribution to the Board. The person filing the document shall provide to the Executive Secretary one copy for each member of the Board.

(g) The ALJ or other Presiding Officer shall determine which parts of the Initial Record and the Adjudicative Record shall be provided to the Board by hard copy and which shall be provided by electronic copy.

(h) Service on a regulated entity at the entity's last known address in the agency's file shall be

deemed service on that entity.

(i) A party shall not file requests for discovery, responses to requests to discovery, deposition notices or other discovery-related papers with the ALJ or other Presiding Officer or the Administrative Proceedings Records Officer unless they are included as exhibits to motions, briefs, testimony or similar submissions, or unless otherwise ordered by the ALJ or other Presiding Officer.

(3) Provisions governing electronic filing and service.

(a) Documents shall be filed with the Administrative Proceedings Records Officer at DEQAPRO@utah.gov. All submissions to that address will be automatically acknowledged. It is the submitter's responsibility to ensure that the submitter receives the acknowledgment and, if no such acknowledgment is received, to contact the Administrative Proceedings Records Officer at (801) 366-0290 within one business day to ensure that the filing was received.

(b) Service on all other parties and on persons who have filed a Petition to Intervene that has not been denied shall be on email addresses provided by those persons. If a submitter is unable, after due diligence, to determine an email address for a party or a person who has filed a Petition to Intervene, the submitter shall provide service by traditional means, as provided in R305-6-109(4).

(c) A text document served by email shall be submitted as a PDF document. A signed document shall be scanned so that the scanned document includes the signature. If a submitter cannot scan a document so that the signature is scanned, the submitter shall file and serve a hard copy of the document as described in R305-6-109(4). The submitter shall still file and serve a searchable electronic document as provided in R305-6-109(3)(d).

(d) If a document served by email is one that has been created by the person serving the document in the course of the adjudicative proceeding, it shall be provided in a searchable format. If a single document cannot include both searchable text and a scanned signature (as required by R305-6-109(3)(d)), the server may submit two PDF documents: one with the scanned signature, and one unsigned but searchable and otherwise identical to the signed document.

(e) The ALJ or other Presiding Officer may order any submission to be provided in a searchable format.

(f) Large emails (5 Mb or more) may not be accepted by some email systems. It shall be the responsibility of a person sending a large email to ensure that it has been received by all parties, e.g., by telephoning or by sending a separate notification email.

(g) Photographic or other illustration documents served by email shall be submitted as:

- (i) a PDF document; or
- (ii) a "JPEG" document.

(h) Documents that are difficult to file or serve by email because of their size or form may be filed or served on a CD or DVD. A document may also be provided in hard copy form if it is impracticable to copy the document electronically. Filing and service of such documents shall be as provided in R305-6-109(4).

(i) A party shall provide a paper copy of any document, including signed documents, upon request by the ALJ or other presiding officer.

(4) Provisions governing traditional filing and service.

(a) Filing and service shall be made:

- (i) by United States mail, postage pre-paid;
- (ii) by hand-delivery;
- (iii) by overnight courier delivery; or
- (iv) by the Utah State Building Mail system, if the sender and receiver are both state employees.

(b) Documents to be filed with the Administrative Proceedings Records Officer shall be submitted to one of these addresses:

By U.S. Mail

Administrative Proceedings Records Officer
Environment Division
Utah Attorney General's Office
PO Box 140873
Salt Lake City Utah 84114-0873

By hand or commercial delivery

Administrative Proceedings Records Officer
Environment Division
Utah Attorney General's Office
160 East 300 South, 5th Floor
Salt Lake City Utah 84111

(c)(i) A document that is filed or served by U.S Mail shall be considered filed or served on the date it is mailed. A document that is filed or served by Utah State Building Mail shall be considered filed or served on the date it is placed in a Utah State Building Mail bin.

(ii) R305-6-109(4)(c)(i) does not apply to a Request for Agency Action or a Petition to Intervene in an agency action. To be timely, those documents must be received for filing within 30 calendar days of the issuance of the Initial Order or a Notice of Violation. See R305-6-202.

R305-6-110. Computation and Extensions of Time.

(1) A business day is any day other than a Friday, Saturday, Sunday or legal holiday.

(2) Computing time.

(a) If a period is stated in calendar days:

(i) exclude the day of the event that triggers the period;

(ii) count every day, including intermediate Fridays, Saturdays, Sundays, and legal holidays; and

(iii) include the last day of the period, but if the last day is a Friday, Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Friday, Saturday, Sunday, or legal holiday.

(b) If a period is stated in business days:

(i) exclude the day of the event that triggers the period; and

(ii) count every business day.

(c) If a document is not served by email, any time for responding to the document shall be extended by three business days.

(3) Extensions of Time.

(a) Except as otherwise provided by statute or this Rule, the ALJ or other Presiding Officer may approve extensions of any time limits established by this rule, and may extend time limits adopted in schedules established under R305-6-207.

(b) R305-6-202(9) governs extensions of time associated with filing Requests for Agency Action and R305-6-205(7) governs extensions of time associated with filing Petitions to Intervene.

(c) The ALJ or other Presiding Officer may also postpone hearings upon motion from the parties, or upon the ALJ's or Presiding Officer's own motion. For matters before a board, the Board Chair may act as Presiding Officer for purposes of this paragraph. In the event the Board Chair is not available, the Executive Director may act as Presiding Officer for purposes of this paragraph.

R305-6-111. Appearances and Representation

(1) A party or a prospective intervenor to a proceeding may be represented:

(a) by an individual if the individual is the party; or

(b) by a designated officer if the party is a person other than an individual.

(2) Any party may be represented by legal counsel. An attorney who is not currently a member in good standing of the Utah State Bar must present a written or oral motion for admission *pro hac vice* made by an active member in good standing of the Utah State Bar. Communication with and service on local counsel shall be deemed to be communication with and service on the party so represented.

R305-6-112. Proceeding Conducted by Teleconference or Other Electronic Means.

(1) If approved by the ALJ or other Presiding Officer, a party or prospective intervenor may participate in any hearing or other proceeding by teleconference or other electronic means if the ALJ or other Presiding Officer determines that it will not unfairly prejudice the rights of the other participants.

(2) Notwithstanding R305-6-112(a), participation by teleconference or other electronic means is not permitted for an evidentiary hearing or dispositive motion hearing.

R305-6-113. Settlement.

The parties may settle all or any portion of an action at any time during an administrative proceeding through a settlement agreement, an administrative settlement order, or a proposed judicial consent decree. Upon notice by the Executive Secretary that there is a proposed settlement that will be subject to a public comment period, the ALJ or other presiding officer shall stay an administrative proceeding, in whole or in part, until the end of that comment period and for an additional 30 calendar days in order to allow the Executive Secretary to make a final settlement determination.

R305-6-114. Modifying Requirements of Rules.

(1) Except as provided in R305-6-114(b), the requirements of these rules may be modified by order of the ALJ or other Presiding Officer for good cause.

(2) The requirements for timely filing a Request for Agency Action under R305-6-202(8) and (9), and a Petition to Intervene under R305-6-205(3), (4) and (7) may not be modified.

R305-6-115. Disqualification of an ALJ, a Board Member or Other Presiding Officer.

(1) An ALJ, Board member or other Presiding Officer shall disqualify himself from performing the functions of the Presiding Officer regarding any matter in which he, or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(a) Is a party to the proceeding, or an officer, director, or trustee of a party;

(b) Has acted as an attorney in the proceeding or served as an attorney for, or otherwise represented a party concerning the matter in controversy;

(c) Knows that he has a financial interest, either individually or as a fiduciary, in the subject matter in controversy or in a party to the proceeding;

(d) Knows that he has any other interest that could be substantially affected by the outcome of the proceeding; or

(e) Is likely to be a material witness in the proceeding.

(2) A board member who attends an evidentiary or other hearing in a matter shall be recused from participating in any proceeding of the board as a whole regarding the same matter.

(3) An ALJ, Board member or other Presiding Officer is also subject to disqualification under principles of due process and administrative law.

(4) These requirements are in addition to any requirements under the Utah Public Officers' and

Employees' Ethics Act, Utah Code Ann., Title 67, Chapter 16.

(5) Motions for Disqualification. Any motion for disqualification of an ALJ, Board member or other Presiding Officer shall be made first to the ALJ, Board or other Presiding Officer. If the Presiding Officer is not the final decisionmaker, a party may seek review of the determination of the ALJ or other Presiding Officer under R305-6-217.

R305-6-116. Limitation on Authority Under Rule.

Nothing in this Rule constitutes a grant of authority for any person other than the recipient to challenge a Notice of Violation or to initiate an action to challenge the agency's enforcement either generally or in a specific situation. See UAPA, Sections 63G-4-102(8) and 63G-4-201(3).

R305-6-117. No Limitation on Authority to Bring Action.

(1) Nothing in this Rule shall be read as a limitation either of the agency's statutory authority to bring an emergency proceeding or a judicial proceeding under UAPA, Section 63G-4-502 or the Department of Environmental Quality Code, Utah Code Ann. Title 19, or of the administrative procedures the agency may use for an emergency proceeding under those authorities.

(2) Failure in this Rule to provide administrative procedures for an administrative action that is authorized by statute shall not be read as a limitation of the agency's authority to bring that action.

R305-6-118. Procedures not addressed.

In the event there are authorities or situations for which procedures are not prescribed by these rules, the ALJ or other Presiding Officer shall, for a specific case, identify analogous procedures or other procedures that will apply. Such proceedings shall be conducted formally under UAPA.

Part 2. Adjudicative Procedures

R305-6-201. Purpose of Part.

Part 2 of this Rule (R305-6-201 through 219) specifies procedures to be used in adjudicative proceedings.

R305-6-202. Requests for Agency Action and Contesting an Initial Order or Notice of Violation.

(1) Procedure. Initial Orders and Notices of Violation may be contested by filing a written Request for Agency Action with the Executive Secretary or the Executive Director, as specified in Part 4 of this Rule and at the address specified in that Part. The Request for Agency Action shall also be served as provided in R305-6-109.

(2) A Request for Agency Action may also be filed to initiate agency action as provided in Part 4.

(3) Any Request for Agency Action is governed by and shall meet all of the requirements of UAPA, Section 63G-4-201(3)(a) and (3)(b).

(4) As provided in Section 63G-4-201(3)(a), a Request for Agency Action shall be in writing and signed by the person making the Request for Agency Action, or by that person's representative, and shall include:

- (a) the names and addresses of all persons to whom a copy of the request for agency action is being sent;
- (b) the agency's file number or other reference number, if known;
- (c) the date that the request for agency action was mailed;
- (d) a statement of the legal authority and jurisdiction under which agency action is requested;
- (e) a statement of the relief or action sought from the agency;

- (f) a statement of the facts and reasons forming the basis for relief or agency action; and
- (5) In addition to the information required by 63G-4-201(3)(a) and R305-6-202(4), a Request for Agency Action shall include the requestor's name, address and email address, if any.
- (6) It is not sufficient under Section 63G-4-201(3)(a) to file a request for a hearing or a general statement of disagreement.
- (7) If a Request for Agency Action is made by a person other than the recipient of an order, the Request for Agency Action shall also include a Petition to Intervene that meets the requirements of Section 63G-4-207 and R305-6-205.
- (8) To be timely, a Request for Agency Action made to contest an Initial Order or a Notice of Violation shall be received for filing, by email or at the address specified in Part 4 of this Rule, within 30 calendar days of the issuance of the Initial Order or a Notice of Violation.
- (9) Extension of Time to File Request for Agency Action.
 - (a) The time for filing a Request for Agency Action may be extended by stipulation of the parties. Any such stipulation shall be filed with the same individual with whom a Request for Agency Action would be filed as specified in Part 4, before the date the order or notice of agency action becomes final.
 - (b) The time for filing a Request for Agency Action may be extended by order of the Board or other final decisionmaker. Any motion for extension shall be filed before the date the order or notice of agency action becomes final.
 - (c) A person that is not a party and that is seeking extensions for filing a Request for Agency Action and a Petition to Intervene may file a single stipulation or motion that complies with this R305-6-202(9) and with R305-6-205(7).
 - (d) Parties are encouraged to use extensions to resolve disputes through informal settlement.

R305-6-203. Notice of Further Proceedings and Response to Request for Agency Action.

- (1) In actions initiated by the agency, the agency shall issue a Notice of Agency Action in accordance with Section 63G-4-201(2).
- (2)(a) In actions initiated by a Request for Agency Action, the ALJ or other Presiding Officer shall issue a Notice of Further Proceedings in accordance with Section 63G-4-201(3)(d) and (e).
- (b) If a matter is not set for hearing at the time the Notice is issued, notice of the time and place for a hearing shall be provided promptly after the hearing is scheduled.
- (3) In responding to a Request for Agency Action challenging a Notice of Violation and Order, the Executive Secretary may, as appropriate, simply reassert information contained in the challenged Notice of Violation and Order.

R305-6-204. Parties.

- (1) For a proceeding that follows an Initial Order or Notice of Violation, the following persons are parties to an adjudicative proceeding:
 - (a) the person to whom the Initial Order or Notice of Violation was directed, such as a person who submitted a permit, license or plan approval application that was approved or disapproved by an Initial Order;
 - (b) The Executive Secretary of the Board who issued an Initial Order or Notice of Violation; and
 - (c) All persons to whom the Board or other final decisionmaker has granted intervention under R305-6-205; and
- (2) For a proceeding that does not follow an Initial Order or Notice of Violation, the following persons are parties to an adjudicative proceeding, as appropriate:

- (a) the person to whom a Notice of Agency Action or other Order was directed;
 - (b) All persons for whom intervention has been granted under R305-6-205; and
 - (c) If the Executive Secretary is the Presiding Officer, other persons within DEQ as designated by the Presiding Officer.
- (3) Amicus Curiae (Friend of the Court). A person may be permitted by the ALJ or other Presiding Officer to enter an appearance as amicus curiae (friend of the court), subject to conditions established by the ALJ or other Presiding Officer.

R305-6-205. Intervention.

- (1) A Petition to Intervene shall meet the requirements of Section 63G-4-207.
- (2) Except as provided in R305-6-205(4), the timeliness of a Petition to Intervene under Section 63G-4-207 shall be determined by the ALJ or other Presiding Officer under the facts and circumstances of each case.
- (3) If an ALJ or other Presiding Officer has been appointed to make a recommended decision to the Board or other final decisionmaker, a recommended decision denying intervention shall be forwarded to the Board or other final decisionmaker for a final determination. A decision by the ALJ or other Presiding Officer to grant intervention may be considered by the Board or other final decisionmaker under R305-6-217 (Interlocutory Review) if the standards specified in that provision are met.
- (4) A person who is not a party to a proceeding but who seeks to challenge an Initial Order of the Executive Secretary that has not been challenged by a party shall file a Petition for Intervention with a Request for Agency Action. Any such Petition to Intervene and Request for Agency Action must be filed before the order becomes final under R305-6-106(1). To be timely, any such a Petition to Intervene shall be received for filing, by email or at the address specified in Part 4 of this Rule, within 30 calendar days of the issuance of the Initial Order or Notice of Violation.
- (5) Any response to a Petition to Intervene shall be filed within 20 calendar days of the date the Petition was filed.
- (6) Petitions to Intervene shall be filed at the same address as provided for Requests for Agency Action in Part 4 of this Rule. Service shall be as provided in R305-6-109, except that the Petition must be received for filing by the deadline.
- (7) Extension of Time to File Petition to Intervene.
 - (a) The time for filing a Petition to Intervene may be extended by stipulation of the parties and the prospective intervenor. Any such stipulation shall be filed before the date the order or notice of agency action becomes final.
 - (b) ~~The 30 day deadline for time for filing a Petition to Intervene~~Request for Agency Action under R305-6-205(4) may be extended by order of the Board or other final decisionmaker. Any motion for extension shall be filed with the same individual with whom a Request for Agency Action would be filed as specified in Part 4, before the date the order or notice of agency action becomes final.
 - (c) A person that is not a party and that is seeking extensions for filing a Request for Agency Action and a Petition to Intervene may file a single stipulation or motion that complies with R305-6-202(9) and with this R305-6-205(7).
 - (d) Parties are encouraged to use extensions to resolve disputes through informal settlement.

R305-6-206. Procedures for Informal Proceedings.

- (1) Procedures for Informal Proceedings are governed by Section 63G-4-203.

- (2) No hearing or other conference is required for an informal proceeding. If a hearing is held, the parties shall be permitted to testify, present evidence and comment on issues. A hearing may be conducted as a meeting rather than using trial-type procedures.
- (3) Discovery and intervention are not available in an informal proceeding. The presiding officer may issue a subpoena or other order to compel the production of necessary evidence.

R305-6-207. Pre-hearing Conferences, Proceedings and Order.

- (1) The ALJ or other Presiding Officer may hold one or more pre-hearing conferences for the purposes of: identifying and, if possible, narrowing the issues that will be considered at a hearing; determining whether an issue will be considered at an evidentiary hearing or a hearing to rule on a dispositive motion; establishing schedules for disclosures and the filing of motions, testimony and pre-hearing memoranda; determining the status of the litigation; considering stipulations of fact or law; and considering any other pre-hearing matters. The ALJ or other Presiding Officer shall issue pre-hearing orders memorializing the determinations made about these matters.
- (2) The ALJ or other Presiding Officer may at any time order a party to make a more clear statement of the issues the party intends to raise at a hearing. The ALJ or other Presiding Officer may also order a party to respond to questions about those issues for the purpose of clarifying the issues. The other parties to the proceeding may, within eight business days of the date a response to the order is served, file and serve comments on the response.
- (3) The ALJ or other Presiding Officer may:
 - (a) require the parties to submit proposed schedules for the proceeding; and
 - (b) change deadlines and page limits for submissions established by this Rule.
- (4) The parties may request the ALJ or other presiding officer hold a conference for the purpose of addressing the matters described in R305-6-207(1).

R305-6-208. Agency Record.

- (1) The final agency record shall consist of:
 - (a) An Initial Record relating to Initial Orders and Notices of Violation, further described in R305-6-208(2);
 - (b) An Adjudicative Record consisting of:
 - (i) All documents filed with the ALJ or other Presiding Officer, and with the Administrative Records Officer;
 - (ii) All orders and other written communications from the ALJ or other Presiding Officer;
 - (iii) All transcripts of hearings and exhibits received into evidence submitted during a hearing; and
 - (iv) Other documents as determined by the ALJ or other Presiding Officer.
- (2)(a) The Executive Secretary shall prepare an Initial Record, which shall consist of background documents for the matter that shall be deemed to be authenticated for purposes of the hearing and motions, and may be introduced as evidence by any party. The Initial Record is not intended to take the place of discovery or of the proffer by parties of documentary evidence.
- (b) The Initial Record shall be indexed and compiled in chronological order. Each page of the Initial Record shall be numbered for ease of reference. A hard copy and an electronic copy of the Initial Record shall be filed with the ALJ or other Presiding Officer. An electronic copy of the Initial Record shall be served as provided in R305-6-109(9). Electronic records shall meet the requirements for electronic filing and service in R305-6-109(9)(c) and (d).
- (c) The Initial Record document index shall include the Initial Order or Notice of Violation being

challenged, any Request for Agency Action, any responsive pleading, and any relevant:

- (i) permit, plan approval or license; application;
- (ii) draft order (such as a permit) that was released for public comment;
- (iii) public comments received;
- (iv) comment response document; and
- (v) final permit.

(d) Documents other than those specified in R305-6-208(2)(c) may be included in the Initial Record only upon the agreement of the parties. Documents that the parties cannot agree upon may be submitted in the course of the proceeding. Failure of a party to object to inclusion of a document in the Initial Record shall be deemed to be agreement to its inclusion in the initial record and to its authenticity.

(e) If many of the documents or large parts of the documents that would ordinarily constitute the Initial Record are irrelevant to the issues raised in the proceeding, the Executive Secretary may propose a more limited Initial Record that does not include the documents specified in R305-6-208(2)(c). If a matter involves a multi-volume permit, for example, the Executive Secretary may propose to exclude the parts of the permit that relate to emergency response if the dispute is about waste sampling.

(f) Analytical analyses of samples documented in the Initial Record are deemed to be accurate unless specifically objected to no later than 15 calendar days before the date the Executive Secretary's preliminary witness lists are due.

(3) Procedure for preparing Initial Record.

(a) Unless the ALJ or Presiding Officer directs otherwise, within 40 calendar days after the date of a Notice of Further Proceedings, the Executive Secretary shall compile a draft index of documents in the Initial Record as described in paragraph (2)(c), and shall provide the list to all other parties. Each party may, within fifteen calendar days of the date the draft index was served, propose to add documents to or delete documents from the index.

(b) The Executive Secretary shall consider the other parties' submissions and shall, within ten calendar days of the date the submissions were served, file an Initial Record.

(c) Parties may file objections to the Initial Record within eight business days of the date of the Initial Record. The Executive Secretary may respond to objections within eight business days of service of the objections.

(d) The ALJ or other Presiding Officer shall consider objections filed and may order changes in the Initial Record.

R305-6-209. Discovery and Disclosure.

(1) Informal discovery by agreement of the parties is preferred. All parties shall have access to information contained in the agency's records unless the records are not required to be disclosed under the Government Records Access and Management Act, Title 63G, Chapter 4, as modified by Section 19-1-306 of the Utah Environmental Quality Code.

(2) Formal discovery is allowed in a matter by agreement of the parties involved in the formal discovery or if so directed by the ALJ or other Presiding Officer in a formal proceeding. The ALJ or other Presiding Officer may order formal discovery when each of the following elements is present:

- (a) informal discovery is inadequate to obtain the information required;
- (b) there is no other available alternative that would be less costly or less burdensome;
- (c) the formal discovery proposed is not unduly burdensome;

(d) the formal discovery proposed is necessary for the parties to properly prepare for the hearing;
(e) the formal discovery does not seek a party's position regarding a question of law or about the application of facts to law that could be addressed in a motion to dismiss or a motion for summary judgment;

~~(f) the formal discovery does not allow a party to probe the mental processes of the Executive Secretary or other agency decisionmaker in making a determination, except to the extent the Executive Secretary or other agency decisionmaker will be offered as a witness for the agency for the purpose of explaining the determination; and~~

(g) the formal discovery proposed will not cause unreasonable delays.

(3)(a) Except as otherwise provided in this Section R305-6-209, the time periods, limitations and other requirements for discovery in the Utah Rules of Civil Procedure shall apply unless otherwise ordered by the ALJ or other Presiding Officer after consideration of the specific formal discovery proposed.

(b) No initial disclosure shall be required as provided in Utah Rules of Civil Procedure Rule 26(a)(1)(B) through (D).

(4) Each party shall provide to the other parties copies of any documents it intends to introduce as provided in R305-6-212(1). This information shall be provided and updated in accordance with a schedule established in the pre-hearing order.

R305-6-210. Subpoenas.

(1) A party requesting an administrative subpoena must prepare it and submit it to the Administrative Proceedings Records Officer for the signature of the ALJ or other Presiding Officer. Each administrative subpoena form shall have the following statement prominently displayed on the form:

This Administrative Subpoena is issued under the authority of the Utah Administrative Procedures Act, Section 63G-4-205(2). If you believe that this subpoena is inappropriate, you may object. The standards of Utah Rules of Civil Procedure, Rule 45, will be used to determine whether a subpoena is appropriate. File any objection with [requestor to insert title and address of ALJ or other Presiding Officer]. See also Utah Admin. Code R305-6-210.

(2) Service. Service of the subpoena shall be made by the party requesting it in a manner consistent with the Utah Rules of Civil Procedure, Rule 45(b).

(3) Objection. A party or other person served with a subpoena may file an objection for the reasons specified in the Utah Rules of Civil Procedure, Rule 45. In response, the party that served the subpoena may file a Motion to Compel. The ALJ or other Presiding Officer shall consider the Motion to Compel and require compliance with the existing subpoena, issue a new subpoena on specified conditions, or quash the subpoena.

R305-6-211. Motions.

(1) Ruling on Motions. Motions may be made by written motion at or before a hearing, or orally during a hearing. Each motion shall include the grounds upon which it is based and the relief or order sought. Copies of written motions shall be filed and served in accordance with R305-6-109.

(2) Responses to motions shall be filed within 15 business days of service of the Motion.

(3) Memoranda in support of or opposition to a dispositive motion may not exceed 25 pages.

Comment [mar21]: To the extent the agency believes any evidentiary privilege application should invoke the appropriate time and allow the ALJ or decisionmaker to address it at that point. This provision improperly allows the agency to control a privilege issue without review by the ALJ or decisionmaker.

Memoranda in support of or in opposition to other motions may not exceed 15 pages. This limit shall not include face sheet, table of contents, statements of issues and facts, or exhibits.

- (4) A reply to a memorandum in opposition to a motion may be filed within seven business days of service of the memorandum in opposition, and is limited to eight pages. A reply memorandum shall be limited to responding to matters raised in the memorandum in opposition.
- (5) Deadlines and page limits may be modified by order of the ALJ or other Presiding Officer.
- (6) When appropriate, parties are encouraged to file dispositive motions, such as a Motion for Summary Judgment, a Motion to Dismiss or a Motion for Judgment on the Pleadings. Parties are encouraged to file dispositive motions no later than 45 calendar days prior to the scheduled hearing.

R305-6-212. Pre-Hearing Briefs and other Pre-Hearing Submissions.

- (1) At least 20 business days before a scheduled hearing, the parties shall exchange proposed exhibits and thereafter shall meet to attempt to stipulate to the admission of exhibits.
- (2) At least 10 business days before a scheduled hearing, the parties shall jointly file and serve any stipulation regarding admission of exhibits and shall file and serve copies of all of its exhibits that are subject to a stipulation. Electronic copies of the exhibits, as described in R305-6-109(9)(c) and (d), shall be filed with the ALJ or other Presiding Officer, and served on other parties. Electronic and hard copies of the exhibits shall be served on the Administrative Proceedings Records Officer.
- (3) Unless otherwise ordered by the ALJ or other Presiding Officer, each party may, but is not required to file, at least 10 business days before a scheduled hearing:
 - (a) A pre-hearing brief, limited to 25 pages, not including exhibits or any statement of facts; and
 - (b) Any motions related to the way the hearing will be conducted, or to the admission of exhibits and other evidence that will be presented at the hearing.
- (4) A party may object to an exhibit when it is introduced in a hearing, except that no party may object to:
 - (a) the authenticity of a record included in the Initial Record;
 - (b) the accuracy of analytical analysis of samples documented in the Initial Record, except as provided in R305-6-208(2)(f).
- (5)(a) Any party may file testimony and evidence using pre-filed testimony of a witness, unless otherwise ordered by the ALJ or other Presiding Officer.
- (b) For lengthy or complex proceedings, pre-filed testimony is preferred and may be required by the ALJ or other Presiding Officer.
- (c) Pre-filed testimony shall be submitted at least 10 business days before a scheduled hearing.

R305-6-213. Hearings.

- (1) The ALJ or other Presiding Officer shall govern the conduct of a hearing, and may establish reasonable limits on the length of witness testimony, cross-examination, oral arguments or opening and closing statements while affording to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence. The ALJ or other Presiding Officer shall also establish the order of presentation at the hearing.
- (2)(a) All hearings shall, at a minimum, be recorded at the agency's expense using audio recording devices. The agency may elect instead to use a court reporter.
- (b) Any party may request that the agency use a court reporter for the hearing, which request shall be granted by the ALJ or other Presiding Officer. Unless otherwise ordered by the ALJ or other

Presiding Officer, the requesting party shall bear the cost associated with these requests. Any such requests shall be submitted to the ALJ or other Presiding Officer at least eight business days before the scheduled hearing.

(3) Evidence.

(a) Except as otherwise stated in this rule, formal proceedings shall be conducted in accordance with the Utah Rules of Evidence.

(b) Every party to an adjudicative proceeding has the right to introduce evidence, subject to the Utah Rules of Evidence. The evidence may be oral or written, real or demonstrative, direct or circumstantial.

(i) The ALJ or other Presiding Officer may admit any reliable evidence possessing probative value which would be accepted by a reasonably prudent person in the conduct of his affairs.

(ii) The ALJ or other Presiding Officer may admit hearsay evidence. However, no finding of fact may be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

(iii) If a party attempts to introduce evidence into a hearing, and it is excluded, the party may proffer the excluded testimony or evidence to allow any reviewing authority to pass on the correctness of the ruling of exclusion.

(c) All witnesses who have provided pre-filed testimony shall be present at the hearing unless otherwise ordered by the ALJ or other Presiding Officer. A witness for whom pre-filed testimony has been submitted shall be allowed to give a brief summary of that testimony, and shall then be made available for cross-examination. The pre-filed testimony of any witness who is not present at the hearing will be excluded unless each opposing party waives cross-examination ~~treated as~~ ~~other hearsay evidence.~~

(d) Oral testimony at a formal hearing will be sworn. The oath will be administered by the reporter, the ALJ or other Presiding Officer. Anyone testifying falsely under oath may be subject to prosecution for perjury in accordance with the provisions of Sections 76-8-502 and 76-8-503.

R305-6-214. Post-Hearing Submissions

Unless otherwise ordered by the ALJ or other Presiding Officer, not later than ten business days after a hearing, each party may, but is not required to submit:

- (1) A post-hearing brief, limited to 10 pages, not including exhibits; and
- (2) Proposed findings of fact and conclusions of law.

R305-6-215. Recommended Decisions and Orders.

(1) If the ALJ or other Presiding Officer is not the final decisionmaker for a matter, the ALJ or other Presiding Officer shall prepare a recommended decision that includes written findings of fact and written conclusions of law, and that meets the requirements of Section 63G-4-208. At the time the ALJ or other Presiding Officer sends the recommended decision to the final decisionmaker, it shall be served on the parties.

(2)(a) Any party may provide comments to the final decisionmaker on the recommended decision.

(b) Unless otherwise ordered by the final decisionmaker, comments shall be filed with the final decisionmaker within eight business days of the date the recommended order is issued. Comments shall cite to the specific parts of the record which support the comments and shall be limited to 20 pages unless an enlargement of pages is approved by the presiding officer responsible for the final decision.

(3) The Board Chair may act as Presiding Officer for purposes of R305-6-215(2)(b). In the

Comment [maz3]: The right to confront witnesses is fundamental to the process and is required under APA 63G-4-206(1)(b).

event the Board Chair is not available, the Executive Director may act as Presiding Officer.

(4)(a) The final decisionmaker shall issue an order that includes written findings of fact and written conclusions of law, and that meets the requirements of Section 63G-4-208.

(b) If the proceeding is subject to the requirements of Section 19-1-301(6)(a), the Board may approve, approve with modifications, or disapprove a proposed dispositive action, including findings of facts and conclusions of law, submitted by the ALJ.

R305-6-216. Consideration by the Board or Other Final Decisionmaker.

(1) If an ALJ or other Presiding Officer submits a recommended decision to the Board or other final decisionmaker, the Parties shall be granted time before the Board or other final decisionmaker to present oral argument regarding the recommended decision.

(2) The final decisionmaker will establish the time allowed for each party.

(3) If the final decisionmaker is a board, the Board Chair may act as the Presiding Officer for purposes of issuing an order establishing the amount and division of time and the order of presentation. In the event the Board Chair is not available, the Executive Director may act as Presiding Officer.

R305-6-217. Interlocutory Review.

(1) This provision applies to proceedings where an ALJ or other Presiding Officer has responsibility for the evidentiary proceedings, but the Board or a different Presiding Officer has responsibility for the final determination.

(2) Ordinarily, a party may challenge an order issued by the ALJ or other Presiding Officer only after the ALJ or other Presiding Officer has made a final recommended decision. However, a party may request interlocutory consideration of an order before that time if a ruling that is alleged to be in error could not be corrected through a challenge to the final recommended decision (e.g., a ruling denying privileged status to records), or in other situations where it may materially advance the termination of the proceeding. The final decisionmaker's determination to hear an interlocutory request to overturn an order is discretionary.

(3) A determination that a document is not privileged, and any determination relative to a motion for stay under R305-6-218 will ordinarily be considered to meet the requirements of R305-6-217(2), but are not exhaustive of the determinations that may be considered to meet the requirements of R305-6-217(2).

R305-6-218. Stays of Orders.

(1) Stay of Orders Pending Administrative Adjudication.

(a) A party seeking a stay of an Initial Order during an adjudicative proceeding shall file a motion with the ALJ or other Presiding Officer.

(b) An ALJ or other Presiding Officer shall grant a stay if the party seeking the stay demonstrates the following:

(i) The party seeking the stay will suffer irreparable harm unless the stay is issued;

(ii) The threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;

(iii) The stay, if issued, would not be adverse to the public interest; and

(iv) There is a substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication.

- (2) The standards specified in R305-6-218(1) shall apply to any interlocutory review of an order regarding a requested stay of an Initial Order.
- (3) Stay of the Order Pending Judicial Review.
- (a) A party seeking a stay of a final order by the Board or other final decisionmaker shall file a motion with the Board or other final decisionmaker.
- (b) The standards specified in R305-6-218(1)(b) shall apply to any such request.
- (4) If granted, a stay suspends the challenged order for the period as directed by the ALJ or other Presiding Officer.

R305-6-219. Default.

- (1) A party may be found in default in accordance with Section 63G-4-209. The default order shall include a statement of the grounds for default and shall be filed and served on all parties.
- (2) A defaulted party may seek to have the default set aside according to procedures set forth in the Utah Rules of Civil Procedure.

Part 3. Declaratory and Emergency Actions

R305-6-301. Purpose of Part.

Part 3 of this Rule (R305-6-301 through 303) governs requests for declaratory and emergency actions.

R305-6-302. Declaratory Orders.

- (1) For all matters over which the Executive Secretary has Initial Order authority as described in Part 4 of this Rule, any Request for a Declaratory Order shall be addressed first to the Executive Secretary. For all other matters, a Request for Declaratory Order shall be filed with the Presiding Officer specified in Part 4 of this Rule.
- (2) Any person who seeks to obtain a declaratory order shall file a Request for Declaratory Order that meets these requirements. The request shall:
- (a) Clearly designate the Request for Agency Action as one requesting a declaratory order;
 - (b) Identify the statute, rule or order to be reviewed;
 - (c) Describe in detail the situation or circumstances in which the applicability of the statute, rule or order is to be reviewed;
 - (d) Describe the Requestor's reason or need for the order;
 - (e) Set out a proposed order;
 - (f) As appropriate, address with specificity each of the circumstances described in R305-6-302(4) and demonstrate that the condition does not apply.
- (3) Failure to submit a complete Request for Declaratory Order is grounds for denying the Request.
- (4) The following classes of circumstances are exempt from declaratory order, as provided in Section 63G-4-503(3)(b):
- (a) Circumstances in which a declaratory order would substantially prejudice the rights of a person who would be a necessary party under the Utah Rules of Civil Procedure, unless the Petitioner has that person's consent in writing;
 - (b) Circumstances in which the person requesting the declaratory order does not have standing;
 - (c) Circumstances in which informal agency opinion or other agency action is

- sufficient to meet the need described in the Petition;
- (d) Circumstances in which questions have already been adequately addressed by the agency in an order or in informal advice;
 - (e) Circumstances that raise questions that are clear and do not warrant an order;
 - (f) Circumstances that are more properly addressed by a statutory change or rulemaking proceedings;
 - (g) Circumstances that arise out of pending or anticipated litigation in a civil, criminal or administrative forum and that are more properly addressed by that forum;
 - (h) Circumstances under which the critical facts are not clear and may be altered by subsequent events, or the issues are otherwise not yet ripe for consideration;
 - (i) Circumstances under which the person making the request is unable to show that real risk to that person will be confronted if the intended course of conduct is taken; and
 - (j) Circumstances involving use of the agency's emergency authority.
- (5) If no declaratory order or order setting the matter for hearing is issued within 60 calendar days of the Request, the Request shall be deemed denied.
- (6) An Initial Order of the Executive Secretary on a Request for Declaratory Action may be challenged as described in R305-6-202. The matter may be resolved using the procedures specified in Part 2 of this Rule, or other procedures specified by the Presiding Officer.

R305-6-303. Emergency Actions.

Emergency orders may be issued as provided in Section 63G-4-502. See R305-6-117.

Part 4. Special Provisions Relating to Specific Statutes

R305-6-401. Purpose of Part.

Part 4 of this Rule (R305-6-401 through 423) provides definitions and other provisions that will govern the way the procedures specified in Part 3 of this Rule will apply to adjudication brought under specific statutes. The following matters are addressed:

- (1) Definitions;
- (2) Identification of Initial Orders and Notices of Violation that are exempt from UAPA requirements;
- (3) Where a Request for Agency Action and other submissions should be filed; and
- (4) Whether proceedings will be conducted formally or informally.

R305-6-402. Addresses for Filing.

- (1) Documents submitted to the Executive Director of the Department of Environmental Quality shall be sent to:

Executive Director
Department of Environmental Quality
P.O. Box 144810
Salt Lake City, Utah 84114-4810

Alternatively, these documents may be delivered by courier or hand delivery to:

Executive Director
Department of Environmental Quality
195 North 1950 West, 4th Floor
Salt Lake City, Utah 84116-3097

- (2) Documents submitted to the Executive Secretary of the Air Quality Board shall be sent to:

Executive Secretary, Utah Air Quality Board
Division of Air Quality
P.O. Box 144820
Salt Lake City, Utah 84114-4820

Alternatively, these documents may be delivered by courier or hand delivery to:

Executive Secretary, Utah Air Quality Board
Division of Air Quality
195 North 1950 West, 4th Floor
Salt Lake City, Utah 84116-3097

- (3) Documents submitted to the Executive Secretary of the Drinking Water Board shall be sent to:

Executive Secretary, Drinking Water Board
Division of Drinking Water
P.O. Box 144830
Salt Lake City, Utah 84114-4830

Alternatively, these documents may be delivered by courier or hand delivery to:

Executive Secretary, Drinking Water Board
Division of Drinking Water
195 North 1950 West, 3rd Floor
Salt Lake City, Utah 84116-3097

- (4) Documents submitted to the Executive Secretary of the Radiation Control Board shall be sent to:

Executive Secretary, Radiation Control Board
Division of Radiation Control
P.O. Box 144850
Salt Lake City, Utah 84114-4850

Alternatively, these documents may be delivered by courier or hand delivery to:

Executive Secretary, Radiation Control Board
Division of Radiation Control

195 North 1950 West, 3rd Floor
Salt Lake City, Utah 84116-3097

- (5) Documents submitted to the Executive Secretary of the Solid and Hazardous Waste Control Board (but not including documents submitted under the Underground Storage Tank Act, Part 4 of Section 19-6 or the Illegal Drug Operations Site Reporting and Decontamination Act, Part 9 of 19-6) shall be sent to:

Executive Secretary, Solid and Hazardous Waste Control Board
Division of Solid and Hazardous Waste
P.O. Box 144880
Salt Lake City, Utah 84114-4880

Alternatively, these documents may be delivered by courier or hand delivery to:

Executive Secretary, Solid and Hazardous Waste Control Board
Division of Solid and Hazardous Waste
195 North 1950 West, 2nd Floor
Salt Lake City, Utah 84116-3097

- (6) Documents submitted to the Executive Secretary of the Solid and Hazardous Waste Control Board pursuant to Parts 4 and 9 of Section 19-6 shall be sent to:

Executive Secretary, Solid and Hazardous Waste Control Board
Division of Environmental Response and Remediation
P.O. Box 144840
Salt Lake City, Utah 84114-4840

Alternatively, these documents may be delivered by courier or hand delivery to:

Executive Secretary, Solid and Hazardous Waste Control Board
Division of Environmental Response and Remediation
195 North 1950 West, 1st Floor
Salt Lake City, Utah 84116-3097

- (7) Documents submitted to the Executive Secretary of the Water Quality Board shall be sent to:

Executive Secretary, Water Quality Board
Division of Water Quality
P.O. Box 144870
Salt Lake City, Utah 84114-4870

Alternatively, these documents may be delivered by courier or hand delivery to:

Executive Secretary, Water Quality Board
Division of Water Quality

195 North 1950 West, 3rd Floor
Salt Lake City, Utah 84116-3097

(8) Documents submitted to the Executive Secretary of the Water Quality Board relative to uranium mill facilities or low-level radioactive waste disposal facilities shall be sent to:

Executive Secretary, Water Quality Board/Radiation
Division of Radiation Control
P.O. Box 144850
Salt Lake City, Utah 84114-4850

For courier or hand delivery, these documents shall be sent to:

Executive Secretary, Water Quality Board/Radiation
Division of Radiation Control
195 North 1950 West, 3rd Floor
Salt Lake City, Utah 84116-3097

R305-6-403. Matters governed by Title 19, Chapter 1 of the Environmental Quality Code, but not including Title 19, Chapter 1, Part 4.

(1) Scope. This subsection R305-6-403 applies to all matters governed by Title 19, Chapter 1, of the Environmental Quality Code.

(2) Definitions.

"Presiding Officer" means the Executive Director.

(3) Orders and notices issued under the authority of Title 19, Chapter 1 of the the Environmental Quality Code are not exempt from the requirements of UAPA. The provisions of UAPA and of this Rule shall apply to proceedings initiated under the authority of Title 19, Chapter 1, the "Environmental Quality Code."

(4) Initiating and intervening in a proceeding. Nothing in this Rule constitutes authority for any person other than the agency to initiate adjudicative proceedings under Title 19, Chapter 1. Nothing in this Rule constitutes authority for any person to intervene in an action commenced under Title 19, Chapter 1.

(5) Proceedings under Title 19, Chapter 1 of the Environmental Quality Code, and specifically under Section 19-1-202(2)(a), will be conducted formally under UAPA.

(6) Agency review under Section 63G-4-301 is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-404. Matters governed by the Air Conservation Act, Title 19, Chapter 2, but not including Sections 19-2-112 or 19-2-123 through 19-2-126.

(1) Scope. This subsection R305-6-404 applies to all matters governed by the Air Conservation Act, Title 19, Chapter 2, but not including Sections 19-2-112 or 19-2-123 through 19-2-126.

(2) Definitions.

"Board" means the Air Quality Board.

"Executive Secretary" means the Executive Secretary of the Air Quality Board.

(3) The Board delegates to the Executive Secretary the authority to issue Initial Orders and Notices of Violation as described in R305-6-404(4).

(4) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Air Conservation Act are exempt from the requirements of UAPA under 63G-4-102(2)(k). Initial Orders and Notices of Violation include, but are not limited to, Initial Orders and Notices of Violation regarding:

- (a) approval, denial, termination, modification, revocation, reissuance or renewal of permits, plans, or approval orders;
- (b) notices of violation and orders associated with notices of violation;
- (c) orders to comply and orders to cease and desist;
- (d) certification for tank vapor tightness testing under R307-342;
- (e) certification of asbestos contractors under R307-801;
- (f) fees imposed for major source reviews under R307-414;
- (g) assessment of other fees except as provided in R307-103-14(7);
- (h) requests for variances, exemptions, and other approvals;
- (i) requests or approvals for experiments, testing or control plans;
- (j) certification of individuals and firms who perform lead-based paint activities and accreditation of lead-based paint training providers under R307-840;
- (k) compliance with the requirements of the Air Conservation Act and rules promulgated thereunder; and
- (l) declaratory orders under Section 63G-4-503 and R305-6-302.

(5) Initiating and intervening in a proceeding. A request to initiate or intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary at the address specified in R305-6-402(2). See also R305-6-202 and R305-6-205.

(6) A challenge to an Initial Order or to a Notice of Violation will be conducted formally under UAPA.

(7) Agency review of the Board's decision under Section 63G-4-301 is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-405. Matters governed by Section 19-2-112 of the Air Conservation Act.

(1) This subsection R305-6-405 describes matters governed by Section 19-2-112(1) of the Air Conservation Act, and applies to matters governed by Section 19-2-112(2) of that Act.

(2) Actions taken under the authority of Section 19-2-112(1) are subject to the procedures specified in that subsection only; neither this Rule nor UAPA applies.

(3) Definitions.

"Presiding Officer" means the Executive Director or any person or persons the Executive Director appoints as Presiding Officer.

(4) Orders and notices issued under the authority of 19-2-112(2) are subject to the requirements of and procedure specified in 63G-4-502. There is no administrative review available for orders issued under this provision. Any request for reconsideration shall be addressed to the Executive Director at the address specified in R305-6-402(1).

(5) Initiating and intervening in a proceeding. Nothing in this Rule constitutes authority for:

- (a) any person other than the agency to initiate adjudicative proceedings under 19-2-112(2); or
- (b) any person to intervene in an action commenced under 19-2-112(2).

R305-6-406. Matters governed by Sections 19-2-123 through 19-2-126 of the Air Conservation Act.

(1) Scope. This subsection R305-6-406 applies to matters governed by Sections 19-2-123 through 19-2-126 of the Air Conservation Act. Sections 59-7-605 and 59-10-1009 of the Utah Tax Code also apply to these matters.

(2) Definitions.

(a) General.

"Board" means, as appropriate, the Air Quality Board or the Water Quality Board.

"Executive Secretary" means, as appropriate, the Executive Secretary of the Air Quality Board or the Water Quality Board.

(3) The Board delegates to the Executive Secretary the authority to issue Initial Orders as described in R305-6-406(5).

(4) Requests relating to air pollution control equipment shall be directed to the Air Quality Board and its Executive Secretary. Requests for water pollution control equipment shall be directed to the Water Quality Board and its Executive Secretary. See Section 19-2-102(14)(a).

(5) Initial Orders issued by the Executive Secretary under the authority of 19-2-123 through 19-2-126 are exempt from the requirements of UAPA under 63G-4-102(2)(k). Initial Orders include, but are not limited to, Initial Orders regarding eligibility of pollution control equipment for tax exemptions under R307-120 and R307-121, and declaratory orders under Section 63G-4-503 and R305-6-302.

(6) Initiating and intervening in a proceeding. A request for agency action or a petition to intervene in a proceeding, as described in this Rule, shall be served, as appropriate under R305-6-406(4), on the Executive Secretary for the Air Quality Board as specified in R305-6-402(2), or on the Executive Secretary for the Water Quality Board as specified in R305-6-402(7).

(7) A challenge to an Initial Order issued under 19-2-123 through 19-2-126 will be conducted formally under UAPA.

(8) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-407. Matters governed by the Radiation Control Act, Title 19, Chapter 3, but not including Section 19-3-109.

(1) Scope. This subsection R305-6-407 applies to all matters governed by the Radiation Control Act, Title 19, Chapter 3, but not including Section 19-3-109.

(2) Definitions.

"Board" means the Radiation Control Board.

"Executive Secretary" means the Executive Secretary of the Radiation Control Board.

(3) The Board delegates to the Executive Secretary the authority to issue Initial Orders and Notices of Violation as described in R305-6-407(4).

(4) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Radiation Control Act are exempt from the requirements of UAPA under 63G-4-102(2)(k). Initial Orders and Notices of Violation include, but are not limited to, Initial Orders and Notices of Violation regarding:

(a) approval, amendment, denial, termination, transfer, revocation, or renewal of licenses or permits;

(b) x-ray facility registration, qualified expert registration, and mammography imaging medical

physicist approval;

- (c) generator site access certifications and registrations;
 - (d) requests for variances or exemptions;
 - (e) notices of violation and orders associated with notices of violation;
 - (f) orders assessing penalties;
 - (g) orders to comply and orders to cease and desist;
 - (h) orders regarding impoundment of radioactive material
 - (i) orders regarding decommissioning;
 - (j) orders regarding financial assurance;
 - (k) orders regarding surveying, monitoring, sampling, or information;
 - (l) compliance with the requirements of the Radiation Control Act and rules promulgated thereunder; and
 - (m) declaratory orders under Section 63G-4-503 and R305-6-302.
- (5) Initiating and intervening in a proceeding. A request for agency action or a petition to intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary as specified in R305-6-402(4).
- (6) A challenge to an Initial Order or notice issued under the Radiation Control Act will be conducted formally under UAPA.
- (7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.
- (8) See R305-6-411(5)(b) regarding the Executive Secretary responsible for water quality matters at uranium mill facilities, low level radioactive waste processing facilities, and low level radioactive waste disposal facilities.

R305-6-408. Matters governed by the Radiation Control Act, Title 19, Chapter 3, Section 19-3-109.

(1) Scope. This subsection R305-6-408 applies to all matters governed by Section 19-3-109 of the Radiation Control Act.

(2) Definitions.

"Board" means the Radiation Control Board.

"Executive Secretary" means the Executive Secretary of the Radiation Control Board.

(3) The Board delegates to the Executive Secretary the authority to issue a Notice of Agency Action assessing penalties under Section 19-3-109.

(4) Before issuing a Notice of Agency Action assessing penalties, the Executive Secretary shall provide at least 30 calendar days' notice of the proposed penalty, and shall provide the recipient with an opportunity to comment on the proposed penalty.

(5) If the recipient of a Notice of Agency Action proposing to assess penalties does not file a written response within 30 calendar days, the Executive Secretary may issue a final order under Section 63G-4-209(1)(c). If the recipient does file a written response, the Board will conduct a formal proceeding on the matter. The Board may delegate decisions, other than dispositive decisions, to an appointed Presiding Officer.

(6) Nothing in this Rule constitutes authority for any person other than the Executive Secretary or the Board to initiate an adjudicative proceeding under Section 19-3-109. Nothing in this Rule constitutes authority for any person to intervene in an action commenced under Section 19-3-109.

(7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-409. Matters governed by the Safe Drinking Water Act, Title 19, Chapter 4, but not including Section 19-4-109(1).

(1) Scope. This subsection R305-6-409 applies to all matters governed by the Safe Drinking Water Act, Title 19, Chapter 4, but not included Section 19-4-109(1).

(2) Definitions.

"Board" means the Drinking Water Board.

"Executive Secretary" means the Executive Secretary of the Drinking Water Board.

(3) The Board delegates to the Executive Secretary the authority to issue Initial Orders and Notices of Violation as described in R305-6-409(4).

(4) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Safe Drinking Water Act are exempt from the requirements of UAPA under 63G-4-102(2)(k). Initial Orders and Notices of Violation include, but are not limited to, Initial Orders and Notices of Violation regarding:

- (a) approval, denial, termination, modification, revocation, reissuance or renewal of permits, plans, or approval orders;
- (b) notices of violation and orders associated with notices of violation;
- (c) orders to comply and orders to cease and desist;
- (d) orders regarding variances and exemptions;
- (e) certification of water supply operators under R309-300 and backflow technicians under R309-305;
- (f) ratings of water systems under R309-400-4;
- (g) assessment of fees;
- (h) concurrence with source protection plans;
- (i) compliance with the requirements of the Safe Drinking Water Act and rules promulgated thereunder; and
- (j) declaratory orders under Section 63G-4-503 and R305-6-302.

(5) Initiating and intervening in a proceeding. A request for agency action or a petition to intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary at the address specified in R305-6-402(3).

(6) A challenge to an Initial Order or notice issued under the Safe Drinking water Act will be conducted formally under UAPA.

(7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-410. Matters governed by the Safe Drinking Water Act, Title 19, Chapter 4, Section 19-4-109(1).

(1) Scope. This subsection R305-6-410 applies to all matters governed by Section 19-4-109 of the Safe Drinking Water Act.

(2) Definitions.

"Board" means the Drinking Water Board.

"Executive Secretary" means the Executive Secretary of the Drinking Water Board.

(3) The Board delegates to the Executive Secretary the authority to issue a Notice of Agency Action assessing penalties under Section 19-4-109(1).

(4) Before issuing a Notice of Agency Action assessing penalties, the Executive Secretary shall provide at least 30 calendar days' notice of the proposed penalty, and shall provide the recipient

with an opportunity to comment on the proposed penalty.

(5) If the recipient of a Notice of Agency Action proposing to assess penalties does not file a written response within 30 calendar days, the Executive Secretary may issue a final order under Section 63G-4-209(1)(c). If the recipient does file a written response, the Board will conduct a formal proceeding on the matter. The Board may delegate decisions, other than dispositive decisions, to an appointed Presiding Officer.

(6) Nothing in this Rule constitutes authority for any person other than the Executive Secretary or the Board to initiate an adjudicative proceeding under Section 19-3-109. Nothing in this Rule constitutes authority for any person to intervene in an action commenced under Section 19-3-109.

(7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-411. Matters governed by the Water Quality Act, Title 19, Chapter 5.

(1) Scope. This subsection R305-6-411 applies to all matters governed by the Water Quality Act, Title 19, Chapter 5.

(2) Definitions.

"Board" means the Water Quality Board.

"Executive Secretary" means the Executive Secretary of the Water Quality Board.

"Presiding Officer" shall mean, as appropriate, an ALJ appointed under 19-1-301, the Board, or, for matters governed by Section 19-5-112(2), the Executive Director.

(3) The Board delegates to the Executive Secretary the authority to issue Initial Orders and Notices of Violation as described in R305-6-411(4).

(4) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Water Quality Act are exempt from the requirements of UAPA under 63G-4-102(2)(k). Initial Orders and Notices of Violation include, but are not limited to, Initial Orders and Notices of Violation regarding:

- (a) approval, denial, termination, modification, revocation, reissuance or renewal of permits, plans, or approval orders;
- (b) notices of violation and orders associated with notices of violation;
- (c) orders to comply and orders to cease and desist;
- (d) orders regarding variances and exemptions;
- (e) assessment of fees;
- (f) requests or approvals for experiments, testing or control plans;
- (g) certification of wastewater treatment works operators under R317-10; and
- (h) certification of individuals who design, inspect, maintain, or conduct percolation or soil tests for underground wastewater disposal systems;
- (i) compliance with the requirements of the Water Quality Act and rules promulgated thereunder; and
- (j) declaratory orders under Section 63G-4-503 and R305-6-302.

(5) Initiating and intervening in a proceeding.

(a) A request for agency action or a petition to intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary and, except as otherwise provided in R305-6-411(5)(b), shall be addressed to the Executive Secretary at the address specified in R305-6-402(7).

(b) The director of the Radiation Control Division has been appointed as a Co-Executive Secretary of the Water Quality Board, with responsibility for uranium mill facilities, low-level

radioactive waste processing facilities, and low level radioactive waste disposal facilities. A request for agency action or a petition to intervene in a proceeding involving an order or notice issued by the Director of the Radiation Control Division as Executive Secretary for the Water Quality Board with respect to those facilities shall be served on the Executive Secretary as specified in R305-6-402(8).

(6) A challenge to an Initial Order or notice issued under the Water Quality Act will be conducted formally under UAPA.

(7) The Executive Director shall be the final decisionmaker for a challenge to a permit decision, as specified in Section 19-5-112(2). The Board shall be the final decisionmaker for all other challenges.

(8) Agency review of the Board's or Executive Director's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-412. Matters governed by the Solid and Hazardous Waste Act, Title 19, Chapter 6, Part 1.

(1) Scope. This subsection R305-6-412 applies to all matters governed by Solid and Hazardous Waste Act, Title 19, Chapter 6, Part 1.

(2) Definitions.

"Board" means the Solid and Hazardous Waste Control Board.

"Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.

(3) The Board delegates to the Executive Secretary the authority to issue Initial Orders and Notices of Violation as described in R305-6-412(4).

(4) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Solid and Hazardous Waste Act are exempt from the requirements of UAPA under 63G-4-102(2)(k). Initial Orders and Notices of Violation include, but are not limited to, initial proceedings regarding:

(a) approval, modification, denial, termination, transfer, revocation, or reissuance of permits or plan approvals;

(b) orders regarding approval for equivalent testing or analytical methods;

(c) notices of violation and orders associated with notices of violation;

(d) orders regarding variances and exceptions;

(e) orders for corrective action;

(f) consent orders;

(g) compliance with the requirements of the Solid and Hazardous Waste Act and rules promulgated thereunder; and

(h) declaratory orders under Section 63G-4-503 and R305-6-302.

(5) Initiating and intervening in a proceeding. A request to initiate or intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary as provided in R305-6-402(5) or (6).

(6) A challenge to an Initial Order or notice issued under the Solid and Hazardous Waste Act will be conducted formally under UAPA.

(7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-413. Matters governed by the Hazardous Substances Mitigation Act, Title 19, Chapter 6, Part 3.

(1) Scope. This subsection R305-6-413 applies to all matters governed by the Hazardous Substances Mitigation Act, Title 19, Chapter 6, Part 3.

(2) Definitions.

"Presiding Officer" means the Executive Director or any person or persons the Executive Director appoints as Presiding Officer.

(3) Orders and Notices of Violation issued under the authority of the Hazardous Substances Mitigation Act are not exempt from the requirements of UAPA. The provisions of UAPA (including as appropriate the emergency provisions of Section 63G-4-502) and of this Rule shall apply to proceedings initiated under the authority of the Hazardous Substances Mitigation Act.

(4) Proceedings under this statute shall be conducted formally under UAPA.

(5) Initiating and intervening in a proceeding. Nothing in this Rule constitutes authority for any person other than the agency to initiate adjudicative proceedings under the Hazardous Substances Mitigation Act. Requests to intervene in a proceeding shall be governed by Section 63G-4-207 and the provisions of this Rule. A petition to intervene in a proceeding shall be served on the Executive Director as provided in R305-6-402(1).

(6) Agency review of the Executive Director's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-414. Matters governed by the Underground Storage Tank Act, Title 19, Chapter 6, Part 4, but not including Sections 19-6-407, 19-6-408, 19-6-416 and 19-6-416.5.

(1) Scope. This subsection R305-6-414 applies to all matters governed by the Underground Storage Tank Act, Title 19, Chapter 6, Part 4, but not including Sections 19-6-407, 19-6-408, 19-6-416 and 19-6-416.5.

(2) Definitions.

"Board" means the Solid and Hazardous Waste Control Board.

"Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.

(3) The Executive Secretary has statutory authority to issue Initial Orders and Notices of Violation as described in R305-6-414(4).

(4) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Underground Storage Tank Act are exempt from the requirements of UAPA under 63G-4-102(2)(k), except as provided in R305-6-415. Initial Orders and Notices of Violation that are exempt from UAPA include, but are not limited to, orders and notices regarding:

(a) approval, denial, termination, or revocation of certifications, registrations, and certificates of compliance;

(b) orders regarding approval for equivalent testing or analytical methods;

(c) notices of violation and orders associated with notices of violation;

(d) orders regarding variances and exceptions;

(e) orders for investigation or corrective action;

(f) apportionment;

(g) consent orders;

(h) compliance with the requirements of the Underground Storage Tank Act and rules promulgated thereunder; and

(i) declaratory orders under Section 63G-4-503 and R305-6-302.

- (4) Initiating and intervening in a proceeding.
- (a) A challenge to a revocation of a certificate of compliance shall be initiated by serving a Request for Agency Action on the Executive Director as provided in R305-6-402(1). *See* Section 19-6-414(3) of the Underground Storage Tank Act.
- (b) All other requests to initiate or intervene in a proceeding, as described in this Rule, shall be directed to the Board and served on the Executive Secretary as provided in R305-6-402(6).
- (5) A challenge to an Initial Order or notice issued under the Underground Storage Tank Act will be conducted formally under UAPA.
- (6) Agency review of the Executive Directors or the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-415. Matters governed by the Underground Storage Tank Act, Title 19, Chapter 6, Sections 19-6-407, 19-6-408, 19-6-416 and 19-6-416.5.

- (1) Scope. This subsection R305-6-415 applies to all matters governed by Sections 19-6-407, 19-6-408, 19-6-416, and 19-6-416.5 of the Underground Storage Tank Act.
- (2) Definitions.
"Board" means the Solid and Hazardous Waste Control Board.
"Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.
- (3) The Executive Secretary has statutory authority to issue a Notice of Agency Action assessing penalties under Sections 19-6-407, 19-6-408, 19-6-416, and 19-6-416.5.
- (4) Before issuing a Notice of Agency Action assessing penalties, the Executive Secretary shall provide at least 30 calendar days' notice of the proposed penalty, and shall provide the recipient with an opportunity to comment on the proposed penalty.
- (5) If the recipient of a Notice of Agency Action proposing to assess penalties does not file a written response within 30 calendar days, the Executive Secretary may issue a final order under Section 63G-4-209(1)(c). If the recipient does file a written response, the Board will conduct a formal proceeding on the matter. The Board may appoint a Presiding Officer for pre-hearing and hearing matters, but any dispositive determinations shall be made by the Board. Proceedings described in paragraph (4) are not exempt from UAPA.
- (6) Nothing in this Rule constitutes authority for any person other than the Executive Secretary or the Board to initiate an adjudicative proceedings under Sections 19-6-407, 19-6-408, 19-6-416, or 19-6-416.5. Nothing in this Rule constitutes authority for any person to intervene in an action commenced under Sections 19-6-107, 19-6-108, 19-6-416 or 19-6-416.5.
- (7) Orders issued by the Executive Secretary to assess penalties under Sections 19-6-407, 19-6-408, 19-6-416 and 19-6-416.5 are not exempt from the requirements of UAPA.
- (8) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-416. Matters governed by the Used Oil Management Act, Title 19, Chapter 6, Part 7.

- (1) Scope. This subsection R305-6-416 applies to all matters governed by the Used Oil Management Act, Title 19, Chapter 6, Part 7.
- (2) Definitions.
"Board" means the Solid and Hazardous Waste Control Board.

"Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.

(3) The Executive Secretary has statutory authority to issue Initial Orders and Notices of Violation as described in R305-6-416(4).

(4) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Used Oil Management Act are exempt from the requirements of UAPA under 63G-4-102(2)(k). Initial Orders and Notices of Violation include, but are not limited to, initial proceedings regarding:

- (a) approval, modification, denial, termination, transfer, revocation, or reissuance of permits, plan approvals, sureties and registrations;
- (b) notices of violation and orders associated with notices of violation;
- (c) orders for corrective action;
- (d) orders regarding variances and exceptions;
- (e) consent orders; and
- (f) registration and revocation of registration of used oil collection centers, used oil aggregation points or DIYer used oil collection centers;
- (g) reclamation orders;
- (h) compliance with the requirements of the Used Oil Management Act and rules promulgated thereunder; and
- (i) declaratory orders under Section 63G-4-503 and R305-6-302.

(5) Initiating and intervening in a proceeding. A request to initiate or intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary as specified in R305-6-402(5).

(6) A challenge to an Initial Order or notice issued under the Used Oil Management Act will be conducted formally under UAPA.

(7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-417. Matters governed by the Waste Tire Recycling Act, Title 19, Chapter 6, Part 8.

(1) Scope. This subsection R305-6-417 applies to all matters governed by Waste Tire Recycling Act, Title 19, Chapter 6, Part 8.

(2) Definitions.

"Board" means the Solid and Hazardous Waste Control Board.

"Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.

(3) The Executive Secretary has statutory authority to issue Notices of Agency Action as described in R305-6-417(4).

(4) Notices of agency action for orders and notices of violation under the Waste Tire Recycling Act include, but are not limited to, notices regarding proceedings for:

- (a) approval, modification, denial, termination, transfer, revocation, or reissuance of permits, plan approvals;
- (b) approvals, denial and other orders regarding financial assurance and insurance;
- (c) notices of violation and orders associated with compliance with the statute;
- (d) orders regarding variances or exemptions;
- (e) orders for corrective action, including reclamation;
- (f) consent orders;

- (g) registration and revocation of registration of waste tire transporters and recyclers;
 - (h) approval of reimbursements;
 - (i) approval of payments to counties or municipalities for costs of a waste tire transporter or recycler to remove waste tires; and
 - (j) declaratory orders under Section 63G-4-503 and R305-6-302.
- (5) If the recipient of a Notice of Agency Action does not file a written response within 30 calendar days, the Executive Secretary may issue a final order under Section 63G-4-209(1)(c). If the recipient does file a written response, the Board will conduct a formal proceeding on the matter. The Board may appoint a Presiding Officer for pre-hearing and hearing matters, but any dispositive determinations shall be made by the Board. Proceedings described in paragraph (4) are not exempt from UAPA.
- (6) Initiating and intervening in a proceeding. A request to initiate or intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary as specified in R305-6-402(5).
- (7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-418. Matters governed by the Illegal Drug Operations Site Reporting and Decontamination Act, Title 19, Chapter 6, Part 9.

- (1) Scope. This subsection R305-6-418 applies to all matters over which the Board has authority under the Illegal Drug Operations Site Reporting and Decontamination Act, Title 19, Chapter 6, Part 9, and under the authority of the Board.
- (2) Definitions.
- "Board" means the Solid and Hazardous Waste Control Board.
- "Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.
- (3) The Board delegates to the Executive Secretary the authority to issue Notices of Agency Action and to respond to Requests for Agency Action as described in R305-6-418(4).
- (4) Proceedings under the Illegal Drug Operations Site Reporting and Decontamination Act include, but are not limited to, notices regarding proceedings for:
- (a) proceedings regarding certifications of decontamination specialists; and
 - (b) declaratory orders under Section 63G-4-503 and R305-6-302.
- (5) If the recipient of a Notice of Agency Action does not file a written response within 30 calendar days, the Executive Secretary may issue a final order under Section 63G-4-209(1)(c). If the recipient does file a written response, the Board will conduct a proceeding on the matter. The Board may appoint a Presiding Officer for pre-hearing and hearing matters, but any dispositive determinations shall be made by the Board. Proceedings described in paragraph (4) are not exempt from UAPA.
- (6) A proceeding regarding an application for certification shall be conducted informally by the Executive Secretary. Agency review of the Executive Secretary's decision is not available. A request for reconsideration may be filed using the procedures specified in Section 63G-4-302.
- (7) A proceeding to revoke certification shall be conducted formally. Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-419. Matters governed by the Mercury Switch Removal Act, Title 19, Chapter 6, Part 10.

(1) Scope. This subsection R305-6-419 applies to all matters governed by the Mercury Switch Removal Act, Title 19, Chapter 6, Part 10.

(2) Definitions.

"Board" means the Solid and Hazardous Waste Control Board.

"Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.

(3) Initial Orders and Notices of Violation issued by the Executive Secretary under the authority of the Mercury Switch Removal Act are exempt from the requirements of UAPA under Section 63G-4-102(2)(k). Initial Orders and Notices of Violation include, but are not limited to, initial proceedings regarding:

- (a) approval, modification, denial, termination, transfer, revocation, or reissuance of plans;
- (b) notices of violation and orders associated with compliance with the statute, including orders for corrective action;
- (c) orders regarding variances and exceptions;
- (d) consent orders;
- (e) compliance with the requirements of the Mercury Switch Removal Act and rules promulgated thereunder; and
- (f) declaratory orders under Section 63G-4-503 and R305-6-302.

(4) Initiating and intervening in a proceeding. A request to initiate or intervene in a proceeding, as described in this Rule, shall be served on the Executive Secretary as specified in R305-6-402(5).

(5) A challenge to an Initial Order or notice issued under the Mercury Switch Removal Act will be conducted formally under UAPA.

(6) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-420. Matters governed by the Industrial Byproduct Reuse Act, Title 19, Chapter 6, Part 11.

(1) Scope. This subsection R305-6-420 applies to all matters governed by the Industrial Byproduct Reuse Act, Title 19, Chapter 6, Part 11.

(2) Definitions.

"Board" means the Solid and Hazardous Waste Control Board.

"Executive Secretary" means the Executive Secretary of the Solid and Hazardous Waste Control Board.

(3) The Executive Secretary has statutory authority to issue Notices of Agency Action as described in R305-6-420(4).

(4) Notices of agency action for orders and notices of violation under the Industrial Byproduct Reuse Act include, but are not limited to, notices regarding proceedings for:

- (a) orders regarding applications for reuse of an industrial byproduct; and
- (b) declaratory orders under Section 63G-4-503 and R305-6-302.

(5) If the recipient of a Notice of Agency Action does not file a written response within 30 calendar days, the Executive Secretary may issue a final order under Section 63G-4-209(1)(c). If the recipient does file a written response, the Board will conduct a formal proceeding on the matter. The Board may appoint a Presiding Officer for pre-hearing and hearing matters, but any dispositive determinations shall be made by the Board. Proceedings described in paragraph (4) are not exempt from UAPA.

(6) Initiating and intervening in a proceeding. A request to initiate or intervene in a proceeding,

as described in this Rule, shall be served on the Executive Secretary as specified in R305-6-402(5).
(7) Agency review of the Board's decision, as provided in Section 63G-4-301, is not available.
A request for reconsideration may be filed under Section 63G-4-302.

R305-6-421. Matters governed by the Voluntary Cleanup Program statute, Title 19, Chapter 8.

(1) Scope. This subsection R305-6-421 applies to all matters governed by the Voluntary Cleanup Program statute, Title 19, Chapter 8.

(2) Definitions.

"Presiding Officer" means the Executive Director or the Executive Director's designee.

(3) Determinations about whether to enter into an agreement under this program lie within the sole discretion of the Executive Director. Unless the Executive Director designates another Presiding Officer, papers shall be filed with the Executive Director as provided in R305-6-402(1).

(4) The Executive Director delegates to the Director of the Division of Environmental Response and Remediation authority to issue orders and other Notices of Agency Action regarding:

(a) proposed determinations regarding approvals, disapprovals or modifications of work plans and reports;

(b) approvals, denials or modifications of certificates of completion; and

(c) declaratory orders under Section 63G-4-503 and R305-6-302.

(5) Agency review of the Executive Director's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-422. Matters governed by the Environmental Institutional Control Act, Title 19, Chapter 10.

(1) Scope. This subsection R305-6-422 applies to all matters governed by the Environmental Institutional Control Act, Title 19, Chapter 10.

(2) Definitions.

"Presiding Officer" means the Executive Director or the Executive Director's designee.

(3) A request to terminate or modify an environmental institutional control adopted under this act shall be considered a Request for Agency Action and shall be directed to the Executive Director as provided in R305-6-402(1). The Executive Director may at any time designate another Presiding Officer. The person submitting the Request for Agency Action shall be notified of the designation.

(4) Proceedings described in paragraph (3) will be conducted under UAPA using formal procedures. Proceedings under the Environmental Institutional Control Act are not exempt from the requirements of UAPA.

(5) Agency review of the Executive Director's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.

R305-6-423. Matters governed by the Uniform Environmental Covenants Act, Title 57, Chapter 25.

(1) Scope. This subsection R305-6-423 applies to all matters governed by the Uniform Environmental Covenants Act, Title 57, Chapter 25.

(2) The Executive Director, or the Executive Director's designee, is the Presiding Officer.

(3) Orders issued by the Executive Director or the Executive Director's designee under the authority of the Environmental Institutional Control Act are not exempt from the requirements of

UAPA.

(4) A request to approve, modify or terminate an environmental covenant shall be considered to be a Request for Agency Action and a proceeding to address the Request shall be conducted under UAPA using formal procedures.

(5) Initiating and intervening in a proceeding. A request to initiate or intervene in a proceeding, as described in this Rule, shall be filed with the Executive Director as specified in R305-6-402(1).

(6) Agency review of the Executive Director's decision, as provided in Section 63G-4-301, is not available. A request for reconsideration may be filed under Section 63G-4-302.



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**Attachment B to UIENC's Comments on the Revisions to R305-6 Administrative
Procedures for the Department of Environmental Quality:**

Compliance with the Clean Water Act's Public Participation Mandate

INTRODUCTION

At a recent public meeting regarding the Department of Environmental Quality's ("DEQ") rulemaking revisions to Utah Administrative rule 305-6—the rules governing the DEQ's administrative procedures—a member of the public questioned whether the proposed revisions would jeopardize Utah's continued administration of the Clean Water Act ("CWA"). Specifically, it was asserted that proposed rule 305-6-205 conflicts with the CWA's public participation provisions because the proposed rule does not allow for intervention that is identical to the rules for intervention outlined by the CWA.

I. The Proposed Rule

Under proposed rule 305-6-205(1), a party wishing to intervene in an administrative proceeding must "meet the requirements of Section 63G-4-207" of the Utah Code. Section 63G-4-207(2), in turn, allows for intervention upon a showing that (1) a petitioner's "legal interests may be substantially affected" by the proceedings and (2) the "interest of justice and the orderly and prompt conduct of the adjudicative proceeding will not be materially impaired by allowing the intervention." It is this second element—the "interest or justice" element—that supposedly places Utah in conflict with the CWA's public participation requirements. Specifically, it was argued that this provision vests a hearing officer with broad discretion to exclude an interested party from intervening in an administrative proceeding. The public commenter also took issue with Utah Code section 63G-4-207(3), in which the presiding officer "may impose conditions" upon the intervenor for the same reasons.

II. The Assertion is a Complaint Against Utah Code Section 63G-4-207, Not Rule 305-6

At its base, the assertion that rule 305-6-205 is in conflict with the CWA is an argument against Section 63G-4-207, not the DEQ's proposed rule. The language that supposedly offends the CWA states "[a] Petition to Intervene shall meet the requirements of Section 63G-4-207." Utah Admin. Code R305-6-207(1). Section 63G-4-207 is the state statute governing intervention

into formal adjudicative proceedings under the Utah Administrative Procedures Act (“UAPA”). As such, the DEQ’s proposed rule merely incorporates the standard that the Utah legislature has established for parties wishing to intervene in an adjudicative proceeding; a statutory standard that has been unchanged since it was originally enacted in 1987. *Compare* Utah Code Ann. § 63G-4-207(2) (2008) (making intervention contingent on affected legal interests and the interest of justice) *with* Utah Code Ann. § 63-46b-9(2) (1987) (relying on the same two-element test).

Thus, the public comment is, in reality, not a complaint that the DEQ’s rulemaking has somehow skewed or misconstrued Utah’s rules for public intervention into an adjudicative proceeding. Rather, the public comment is a complaint that Utah’s long-standing statutory scheme governing intervention into such proceedings is in conflict with the provisions of the CWA because the statutory scheme vests a hearing officer with discretion that would not be permitted if the program was administered by the EPA. Because UAPA is not, and cannot be, the subject of the current rulemaking, the assertion about alleged inadequate intervention requirements is not germane to the rulemaking.

III. Federal Public Participation

The assertion that the proposed rule 305-6 conflicts with the CWA is based on a contention that Congress infused the CWA with a policy favoring public participation.¹ Public participation is undoubtedly emphasized in the CWA. 33 U.S.C. § 1251(e) (CWA § 101) (“Public participation . . . shall be provided for, encouraged, and assisted by the Administrator and the States.”); *see also id.* § 1319(g)(4) (CWA § 309) (providing for “[r]ights of interested persons”); § 1365 (CWA § 507) (providing for citizens suits).

Indeed, the EPA must provide “minimum guidelines for public participation” under the CWA. *Id.* § 1251(e) (CWA § 101). But the “statutory text does not, however, elaborate on the extent of public participation contemplated by Congress.” *NRDC v. EPA*, 859 F.2d 156, 175 (D.C. Cir. 1988). The EPA promulgated 40 CFR 123.27 to provide for public participation within a state-enforcement process. Subsection 123.27(d) provides:

Any State administering a program shall provide for public participation in the State enforcement process by providing either:

¹ The public commenter also referenced a Supreme Court decision for the proposition that “Congress contemplated that these regulations would do more than play lip service to the public participation, that they must have a genuine opportunity to speak on the issue of protection of its waters and that we’re not to be treated as nuisances or troublemakers, but rather as welcome participants in the vindication of environmental issues.” This quote is actually a mix of a Supreme Court decision, *Costle v. Pacific Legal Found.*, 100 S.Ct. 1095 (1980) and a decision by the D.C. Circuit Court of Appeals, *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988). It is noteworthy, that in *NRDC v. EPA*, the D.C. Circuit was asked to invalidate EPA regulations that did not require states to provide a right to intervention in a judicial proceeding identical to 33 U.S.C. § 1365 (CWA § 505), which specifically states that citizens “may intervene as a matter of right” into an action brought in federal court. *Id.* at 176. The Court found that in enacting the CWA, Congress did not impose a mandate that states provide an identical right to intervention in state court. *Id.*

(1) Authority which allows intervention as a right in any civil or administrative action . . . by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency . . . will: (i) [i]nvestigate and provide written responses to all citizen complaints . . . ; (ii) [n]ot oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) [p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

This regulation does not require the state to provide for intervention that is identical to what the EPA would impose in the absence of state assumption of the NPDES permitting program. Rather, this regulation requires intervention, like Utah's scheme, on the basis of substantial impact to a legal interest, i.e., the intervenor must show they may be "adversely affected" by the proceedings. 40 CFR 123.27(d)(1).

In a related regulation, 40 CFR 123.30 also speaks to the public participation in regard to the availability and access to judicial review of a state's final approval or denial of a discharge permit issued pursuant to the CWA.

All States that administer . . . a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows for an opportunity for judicial review that is the same as that available to obtain judicial review in federal court.

40 CFR 123.30. Even in the context of allowing intervention during judicial review, the CWA does not require a state's regulations to identically mirror the federal scheme; the regulation states that following the federal standard is merely one method, not the exclusive method, for the state to meet the CWA's public participation mandate. The preamble that the EPA authored when it published the final rule on this regulation is instructive. The EPA enacted 40 CFR 123.30 in response to the actions of a number of states that had dramatically restricted public access to judicial review of the state's final decision to issue or deny a permit to the regulated entity. 61 Fed. Reg. 20971, 20973 (May 8, 1996) (citing to the law of Virginia). But subpart 123.30 provides a "flexible, functional test" for public participation, not a hard-and-fast rule mandating the adoption of the federal scheme. *Id.* at 20975. Indeed, all a state must do is provide for judicial review "that is sufficient" to allow for public participation. *Id.* "EPA believes that if State law does not allow broad standing to judicially challenge State-issued NPDES permits—including standing based on injury to aesthetic, environmental, or recreational interests—the opportunity for judicial review will be insufficient to ensure . . . public participation." *Id.*

IV. Public Participation Provisions Must be Comparable to, Not Identical with, the CWA

The claim that Utah's intervention provision is contrary to the CWA is not unique. Federal courts have repeatedly been asked similar questions regarding the method states provide for public participation while administering the CWA. Consistently, these courts have held that the public participation provisions of a state program need only be "comparable" to their federal counterparts. See *N. & S. Rivers Watershed Assoc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1992) ("So long as the provisions in the State Act *adequately safeguard* the substantive interest of citizens in enforcement actions, the rights of notice and public participation found in the State Act are *satisfactorily comparable* to those found in the Federal Act." (emphasis added)); *Paper, Allied-Ind., Chemical & Energy Workers International Union v. Continental Carbon Co.*, 2003 WL 24206367 (W.D. Okla., June 23, 2003) ("[A] state law must provide for a right to a hearing and for public notice and participation procedures *similar* to those set forth in section 309(g)." (emphasis added)). The DEQ's proposed intervention rule is similar and comparable to the CWA's rules governing intervention. The proposed rule allows a would-be intervenor the right to intervene in an administrative proceeding upon a showing that the intervenor's interests may be substantially affected by the proceedings and that the interest of justice will not be materially impaired by intervention.

Indeed, several courts have found state laws, which are analogous to Utah's intervention standard, to be sufficiently comparable to the requirements of the CWA. The most relevant of these is the Fifth Circuit's decision in *Locket v. EPA*, wherein a property owner challenged Louisiana's administration of the CWA due to alleged inadequate provisions in state law governing notice and public participation. 319 F.3d 678, 682 (5th Cir. 2003). Under Louisiana law, a party was permitted to intervene in an adjudicatory hearing by showing that (1) they may be an "aggrieved party" and (2) when intervention is "unlikely to unduly broaden the issues or unduly impede resolution of the matter." *Id.* at 685-86 (internal quotation marks omitted). Moreover, the plaintiffs specifically argued that the statute vested the agency with too much discretion to deny intervention to an interested party. *Id.* at 686-87. But the Fifth Circuit rejected this argument, holding that "this discretion does not deny citizens an opportunity to participate in the process" and that Arkansas law is "comparable" to the CWA. *Id.* at 687.²

Utah's statutory scheme is analogous to the statute at issue in *Locket*. Like Arkansas, Utah's rule for intervention begins with an analysis of whether the would-be intervenor would be "substantially affected" by the adjudication; in other words would the intervenor be aggrieved by the agency's decision. Next, the two statutory schemes both permit a limiting of intervention on the basis of interference with the resolution of the proceedings. Thus, the addition of the

² Likewise, in *Arkansas Wildlife Fed. v. ICI Americas Inc.*, a federal district court found that an Arkansas regulation that based intervention on timeliness of a petition to intervene and the potential for adverse affects on a petitioner's interests was sufficiently comparable to 40 CFR § 123.27(d). 842 F.Supp. 1140, 1146-47 (E.D. Ark. 1993). In several instances, Utah courts have interpreted the interest-of-justice element of section 63-46b-9 (renumbered as 63G-4-207) as requiring a timely motion to intervene. See *In re Questar Gas Co.*, 175 P.3d 545 (Utah 2007); *Millard County v. Utah State Tax Comm'n*, 823 P.2d 459 (Utah 1991).

“interest of justice” element to Utah’s intervention statute does not render the state’s intervention provision, and the related administrative rules, invalid due to an element of discretion because the standard under Utah law is comparable to intervention under the federal scheme. Indeed, the Utah Supreme Court has held that intervention under UAPA does not vest a hearing officer or agency with the degree of discretion that the public commenter complains of. Rather an agency’s discretion under 63G-4-207 “is limited, and to deny a motion to intervene, the [agency] must rely on substantial reasons.” *Millard County v. Utah State Tax Comm’n*, 823 P.2d 459, 462 (Utah 1991) (interpreting Utah Code section 63-46b-9, which was subsequently renumbered as section 63G-4-207).